Friendly Ice Cream Corporation *and* Hotel, Restaurant, Bartenders and Institutional Employees Union, Local 26, AFL-CIO. Case 1-CA-19145

July 16, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on October 13, 1981, by Hotel, Restaurant, Bartenders and Institutional Employees Union, Local 26, AFL-CIO, herein called the Union, and duly served on Friendly Ice Cream Corporation, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 1, issued a complaint on October 28, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 30, 1981, following a Board election in Case 1-RC-16285, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about October 8, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining repesentative, although the Union has requested and is requesting it to do so. On November 6, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On January 15, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on January 21, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint[2] Respondent admits that it refused the Union's request to bargain with it as the exclusive representative of the employees in the certified unit. In defense of such conduct, Respondent essentially contests the validity of the Union's certification. Specifically, Respondent argues: (1) that the unit found to be appropriate in the underlying representation proceeding, Case 1-RC-16285, is an inappropriate unit in that the employees do not share a community of interest, and (2) that the results of the secret-ballot election conducted on June 27, 1980, did not reflect the choice of a majority of eligible employees, in that the challenges to a determinative number of ballots were improperly resolved in Case 1-RC-16285. The General Counsel contends that Respondent seeks to relitigate issues which were raised and decided in the prior representation case. We agree with the General Counsel.

A review of the record, including that in the representation proceeding in Case 1-RC-16285, reveals that, upon a petition filed by the Union, a representation hearing was held by the Regional Director for Region 1 at which both parties were afforded the opportunity to present all relevant evidence. On May 30, 1980, the Regional Director issued his Decision and Direction of Election in which he found the following unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the National Labor Relations Act, as amended:

> All full time and regular part time waiters, waitresses, cooks, busboys, busgirls, cashiers, and shift supervisors employed by the Employer at its 435 Washington Street, Wey-

[1] Official notice is taken of the record in the representation proceeding, Case 1-RC-16285, and related unfair labor practices Cases 1-CA-16097, 1-CA-16212, and 1-CA-16216, as the term "record" is defined in Secs. 102.68, 102.69(g), 102.45(b), and 102.46 of the Board's Rules and Regulations, Series 8, as amended. See *Santee River Wool Combing Company, Inc.*, 221 NLRB 108 (1975); *Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO (Mansfield Contracting Corporation)*, 206 NLRB 423 (1973); *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] In its opposition to the General Counsel's Motion for Summary Judgment Respondent makes three arguments for denial of the motion. Each is without merit. Respondent first contends that the General Counsel did not serve on Respondent the exhibits referenced in the motion. We are advised administratively that the General Counsel has since served Respondent with the relevant exhibits, thereby mooting this aspect of Respondent's opposition.

Respondent's second and third arguments in opposition to the motion are that the General Counsel has failed to file with the Board the full record in the underlying prior representation proceeding, and related unfair labor practice proceedings. As indicated in fn. 1 of this Decision, official notice has been taken of the record in those earlier proceedings.

mouth, Massachusetts location, but excluding all bookkeepers, managers, manager trainees, assistant managers, guards and all supervisors as defined in the Act.

On June 19, 1980, the Employer filed with the Board a request for review of the Regional Director's Decision and Direction of Election,[3] contending that the single restaurant unit found to be appropriate would be disruptive to the employees and the Employer alike given the frequent interchange of employees among the Employer's many restaurants. The Board telephonically denied the Employer's request for review on June 27, 1980, and confirmed its denial by telegram dated June 30, 1980.

An election was held on June 27, 1980, and resulted in a tally of nine votes for and eight votes against the Petitioner, with nine challenged ballots. Thereafter, the Petitioner filed objections to conduct affecting the results of the election. The Regional Director conducted an investigation of the challenges and objections and issued his Supplemental Decision, which concluded that, since the challenged ballot of one individual, Lisa Dow, and four of the Petitioner's objections involved issues that were then pending before an Administrative Law Judge in Cases 1-CA-16097, 1-CA-16212, and 1-CA-16216, the representation proceeding should be consolidated with those cases for hearing before the Administrative Law Judge. However, before the Regional Director issued an order to consolidate, the Administrative Law Judge issued his Decision (JD-114-80).[4] On September 3, 1980, the Regional Director issued his Second Supplemental Decision ordering a hearing on the eight challenges and remaining objections not disposed of by the Administrative Law Judge's Decision. On March 9, 1981, the Board issued its Decision and Order in Cases 1-CA-16097, 1-CA-16212, and 1-CA-16216, reported at 254 NLRB 1206, in which it, *inter alia*, affirmed the Administrative Law Judge's finding that Respondent did not unlawfully refuse to rehire Lisa Dow.

Following a hearing, at which the parties had a full opportunity to present evidence, examine witnesses, and file briefs, the Hearing Officer issued his Report on Challenged Ballots and Objections, sustaining the challenges to four ballots, overruling the challenges to four ballots, and recommending that certain of the Petitioner's objections be sustained. The Employer filed exceptions to, *inter alia*, the overruling and sustaining of the specific challenges and the sustaining of certain objections. The Acting Regional Director, on July 30, 1981, issued a Third Supplemental Decision and Direction of Second Election, adopting all of the Hearing Officer's findings, conclusions, and recommendations. Further, the Acting Regional Director sustained the challenge to the ballot of Lisa Dow and overruled those parts of the objections which were based on her situation. The Employer then filed with the Board a request for review of the Acting Regional Director's Third Supplemental Decision and Direction of Second Election. The Board telephonically denied the request for review on September 14, 1981, and confirmed this denial by telegram of September 16, 1981.

On September 24, 1981, the Regional Director opened and counted the four ballots whose challenges had been overruled. The revised tally of ballots showed that 11 votes had been cast for and 10 against the Union. On September 30, 1981, the Regional Director issued his Certification of Representative certifying the Union as the exclusive collective-bargaining representative of the unit of employees found to be appropriate in the Regional Director's Decision and Direction of Election issued on May 30, 1980.

In a letter dated October 1, 1981, and again by letter dated October 8, 1981, the Union requested that Respondent bargain with it with respect to rates of pay, wages, hours, and other terms and conditions of employment. By letter dated October 8, 1981, Respondent refused to recognize or bargain with the Union.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[5]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

[3] The Employer also included a motion to stay the election, but later withdrew this aspect of its request for review prior to the election.

[4] The Administrative Law Judge found that Respondent had not violated the Act by refusing to rehire Lisa Dow, and had otherwise not committed any unfair labor practices.

[5] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a Massachusetts corporation which maintains various establishments within the Commonwealth of Massachusetts where it sells food, ice cream, and related products, including a shop at 435 Washington Street, in the city of Weymouth, Massachusetts, which is the facility involved in this proceeding. Respondent's annual gross revenues are in excess of $500,000, and its annual purchases of products, goods, and materials which are shipped to it directly through channels of interstate commerce from locations outside the Commonwealth are in excess of $50,000.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Hotel, Restaurant, Bartenders and Institutional Employees Union, Local 26, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full time and regular part time waiters, waitresses, cooks, busboys, busgirls, cashiers, and shift supervisors employed by the Employer at its 435 Washington Street, Weymouth, Massachusetts location, but excluding all bookkeepers, managers, manager trainees, assistant managers, guards and all supervisors as defined in the Act.

2. The certification

On June 27, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Acting Regional Director for Region 1, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on September 30, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about October 1, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about October 8, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since October 8, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Friendly Ice Cream Corporation, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the ap-

propriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Friendly Ice Cream Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hotel, Restaurant, Bartenders and Institutional Employees Union, Local 26, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full time and part time waiters, waitresses, cooks, busboys, busgirls, cashiers, and shift supervisors employed by Respondent at its 435 Washington Street, Weymouth, Massachusetts location, but excluding all bookkeepers, managers, manager trainees, assistant managers, guards and all supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 30, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 8, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Friendly Ice Cream Corporation, Weymouth, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hotel, Restaurant, Bartenders and Institutional Employees Union, Local 26, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full time and regular part time waiters, waitresses, cooks, busboys, busgirls, cashiers, and shift supervisors employed by Respondent at its 435 Washington Street, Weymouth, Massachusetts location, but excluding all bookkeepers, managers, manager trainees, assistant managers, guards and all supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facility at 435 Washington Street, Weymouth, Massachusetts, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hotel, Restaurant, Bartenders and Institutional Employees Union, Local 26, AFL–CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full time and regular part time waiters, waitresses, cooks, busboys, busgirls, cashiers, and shift supervisors employed by the Employer at its 435 Washington Street, Weymouth, Massachusetts location, but excluding all bookkeepers, managers, manager trainees, assistant managers, guards and all supervisors as defined in the Act.

FRIENDLY ICE CREAM CORPORATION